JAN 11 2001 (14)

Supreme Court, U.S.
FILED
JAN 11 2001
CLERK

No. 00-6677

IN THE

Supreme Court of the United States

JOHNNY PAUL PENRY,

Petitioner,

v.

GARY L. JOHNSON, Director, Texas Department of Criminal Justice, Institutional Division,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

EDWARD M. CHIKOFSKY
Counsel of Record
301 East 87th Street
New York, NY 10128
(212) 289-1062

JOHN H. PICKERING
CHRISTOPHER J. HERRLING
RUSSELL P. HANSER
ANDREW R. VARCOE
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

LISA B. KEMLER
ZWERLING & KEMLER, P.C.
108 North Alfred Street
Alexandria, VA 22314
(703) 684-8000

Counsel for Amicus Curiae
National Association of Criminal Defense Lawyers

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QUESTION PRESENTED — CAPITAL CASE

1. Whether the trial court's submission to the jury of the same three "special issues" previously held to violate this defendant's constitutional rights in *Penry v. Lynaugh*, 492 U.S. 302 (1989), was inconsistent with that case and other relevant decisions of this Court.*

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* This brief does not address the second question presented in Penry's petition for certiorari.

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit corporation with more than 10,000 member attorneys, and another 28,000 affiliate members, in all fifty states and the District of Columbia. The American Bar Association recognizes the NACDL as an affiliate organization with representation in its House of Delegates. The NACDL has appeared before this Court as *amicus curiae* on many previous occasions. *See, e.g., Slack v. McDaniel*, 529 U.S. 473 (2000); *Hohn v. United States*, 524 U.S. 236 (1998).

The NACDL was founded in 1958 to advance study and research in the field of criminal law; to disseminate and expand knowledge of the law in the area of criminal practice; and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. It aims to promote the proper administration of justice and to ensure that capital punishment is imposed only in accordance with the strict demands of the United States Constitution. Because its members and affiliates routinely represent death-eligible defendants, NACDL possesses a unique perspective on the need for clear jury instructions to ensure that constitutional mandates are fulfilled in capital cases.

This brief's scope is limited to the first question presented: the inadequacy of the jury charge at Penry's resentencing subsequent to this Court's decision in *Penry v. Lynaugh*, 492 U.S. 302 (1989) ("*Penry I*").

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[1] Both parties have consented to NACDL's appearance in this matter as *amicus curiae* in support of petitioner. No counsel for any party has authored this brief in whole or in part and no person or entity, other than *amicus curiae*, has made a monetary contribution to the preparation or submission of this brief. Sup. Ct. Rule 37.6.

SUMMARY OF ARGUMENT

In *Penry I*, this Court overturned a capital sentence imposed pursuant to a Texas statute channeling the sentencing jury's discretion through a series of three "special issues." The Texas framework, which required that jurors sentence a defendant to death upon answering affirmatively the three special issues, effectively precluded jurors from giving meaningful consideration to mitigating evidence of petitioner Penry's mental retardation and history of childhood abuse. These constituted significant "aspect[s] of [his] character or record . . . proffer[ed] as a basis for a sentence less than death," whose consideration was required by *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (footnote omitted), and subsequent cases.

But Penry's resentencing, following a retrial, did not redress the constitutional infirmities identified in *Penry I*. In the wake of *Penry I*, the Texas legislature modified its capital sentencing regime to conform to *Penry I* by requiring that, notwithstanding the three special issues, jurors must also independently consider, and take into account, *any* relevant evidence justifying a penalty less than death.[2] This statutory amendment resulting from his own case, however, came too late for Johnny Penry, who was retried before it took effect. Penry's jurors were thus presented with the *same* special issues that governed his initial sentencing. The trial judge purported to remedy the constitutional defect by issuing a supplementary jury instruction. But while the instruction purportedly allowed the jurors to "give effect and consideration" to mitigating factors, it directed them to exercise that prerogative only "at the time [they] answer[ed] the special issue[s]," and only to the extent that the mitigating evidence allowed "a negative finding . . . [with respect] to one of the special issues." This improvised

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[2] Tex. Code Crim. Proc. Ann. art. 37.071 § 2(e)(1) (Vernon 1981 & 2001 Supp.) (effective September 1, 1991).

supplementary charge, allowing the jury to consider mitigating evidence, but only as it applied to the three special issues, constituted an inadequate response to *Penry I*.

Indeed, the jury charge as a whole was hopelessly confusing, creating for the second time a reasonable likelihood that the jury would, as it did, send Penry to his death despite the presence of mitigating evidence that individual jurors may have believed justified a lesser sentence. The ambiguous instruction admitted of two interpretations: One construction required jurors to give effect to mitigating evidence, but only to the extent that such evidence invited a negative answer to a special issue; the other effectively required them to answer falsely one or more of the precise special issues by which they had sworn to abide. There is at least a "reasonable likelihood" that jurors chose the former construction, and thus failed to give Penry's mitigating evidence its constitutional due.

ARGUMENT

I. THE JURY INSTRUCTIONS AT PENRY'S RESENTENCING REPEATED THE ERRORS IDENTIFIED IN *PENRY I* BY IMPERMISSIBLY CHANNELING THE JURY'S CONSIDERATION OF PENRY'S MITIGATING EVIDENCE INTO THE SPECIAL ISSUE INQUIRIES.

The trial judge's charge failed to ensure that jurors would be able meaningfully to take into account *all* relevant mitigating evidence, as required by *Penry I* and related cases.

The charge at issue in *Penry I* limited jurors' discretion by directing them to consider three "special issues": (1) whether the defendant committed the crime "deliberately;" (2) whether there was a "probability that the defendant would commit [further] criminal acts of violence;" and (3) whether the defendant's conduct "was unreasonable in response to the provocation, if any, by the deceased." If

the jury found that the answer in each case was "yes," it was required to impose the death penalty; otherwise, it was prohibited from doing so. Tex. Code Crim. Proc. Ann. art. 37.071(b) (Vernon 1981 & Supp. 1989). Penry's original jury answered "yes" to each issue and sentenced him to death. *See Penry I*, 492 U.S. at 311. This Court held that the jury was unable to give effect to Penry's unique mitigating evidence within the special issue framework. *See id.* at 322-23 (holding that Penry's mental retardation rendered him "less able than a normal adult to control his impulses or to evaluate the consequences of his conduct," and thus permitted the conclusion that he "was less morally culpable than defendants who have no such excuse"). Accordingly, the Court vacated Penry's death sentence.

After *Penry I*, the Texas legislature itself recognized that the prevailing special issue regime was flawed. In 1991, it enacted a revised capital sentencing statute providing that, before imposing a capital sentence, jurors must be allowed to consider any relevant mitigating evidence, even if that evidence is not directly applicable to any other special issue, and to return a sentence other than death, notwithstanding their answers to the other special issues.[3] The legislature made plain its belief that the revision was necessitated by *Penry I*: The committee in which the amendment originated stated its intention to "give[] effect to the Supreme Court's decision in *Penry* [*I*]," Texas Senate Comm. on Criminal Jurisprudence, Bill Analysis on S.B. 880, at 1, and supporters in the full Texas House of Representatives believed that the shift was necessary to "bring[] the statute into line with the *Penry* requirements to allow juries to consider mitigating circumstances," House Research Organization, Texas House of Representatives, Bill Analysis on H.B. 1240, at 4 (May 6, 1991).

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[3] Tex. Code Crim. Proc. Ann. art. 37.071 § 2(e)(1) (Vernon 1981 & 2001 Supp.).

But Penry was resentenced before this amendment took effect, under the same "special issues" regime used during his first trial. The only pertinent difference was that the trial judge issued an oral instruction purportedly designed to cure the infirmities identified in *Penry I*. The following comparison of that charge and the instruction now required by Texas law illustrates just how deficient and confusing the trial judge's charge was:

TRIAL JUDGE'S ACTUAL INSTRUCTION	REVISED STATUTORY INSTRUCTION
"If you find that there are any mitigating circumstances in this case, you must decide how much weight they deserve, if any, and therefore, give effect and consideration to them in assessing the defendant's personal culpability *at the time you answer the special issue*. If you determine, when giving effect to the mitigating evidence, if any, that a life sentence, *as reflected by a negative finding to the issue under consideration*, rather than a death sentence, is an appropriate response to the personal culpability of the defendant, *a negative finding should be given to one of the special issues*."[4]	If, "taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed," the jury may not impose a death sentence.[5]

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[4] *Penry v. State*, 903 S.W.2d 715, 765 (Tex. Crim. App. 1995) (emphases added).

[5] Tex. Code Crim. Proc. Ann. art. 37.071 § 2(e)(1) (Vernon 1981 & 2001 Supp.).

The amended Texas statute did not govern Penry's resentencing, but it forcefully confirms that the trial court's improvised modification of the special issues regime failed to remedy the constitutional defects that plagued his original sentencing. The resentencing jury was never told — as Texas law now requires — that, wholly independent of the special issues, it "could consider and give effect to the mitigating evidence of Penry's mental retardation and abused background by declining to impose the death penalty." *Penry I*, 492 U.S. at 328. Rather, the charge emphasized — not once, but twice — that findings regarding the mitigating evidence were to be accorded relevance *only within the context of* the special issues. The first sentence allowed consideration of such evidence only "at the time" the jury considered a special question; the second sentence permitted the jury to give effect to such evidence only by providing a negative answer to one of those questions, and only when mitigation was appropriate "as reflected by a negative finding to the issue under consideration." Thus, far from allowing the jury to consider "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffer[ed] as a basis for a sentence less than death," *Lockett*, 438 U.S. at 604, the resentencing instruction permitted consideration of mitigating aspects *only insofar as they permitted the jury to answer "no" to one of the three special issues*.

The judge's charge, then, failed utterly to apprise the jury of its prerogative to consider and to give effect to all mitigating evidence, even outside the context of the "special issues." This Court has long held that although the state "may structure the jury's consideration of mitigation," it must "not preclude the jury from giving effect to it." *Weeks v. Angelone*, 120 S. Ct. 727, 732 (2000); *see also Woodson v. North Carolina*, 428 U.S. 280, 303 (1976). Mitigating evidence is inherently relevant "because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to

emotional or mental problems, may be less culpable than defendants who have no such excuse." *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring).

The defendant's entitlement to *present* mitigating evidence is not, alone, sufficient: "The sentencer must also be *able to consider and give effect to* that evidence in imposing sentence," *Penry I*, 492 U.S. at 319 (emphasis added and citation omitted), and "*any barrier* to such consideration must . . . fall," *McKoy v. North Carolina*, 494 U.S. 433, 442 (1990) (emphasis added); *see also Buchanan v. Angelone*, 522 U.S. 269, 276 (1998) (noting the Court's "consistent concern . . . that restrictions on the jury's sentencing determination not preclude the jury from being able to give effect to mitigating evidence").[6]

Consistent with these principles, this Court could not have been clearer when it "agree[d]" with Penry's argument that "his mitigating evidence of mental retardation and childhood abuse ha[d] relevance to his moral culpability *beyond the scope of the special issues*," and that a sentencing scheme that failed to account fully for that relevant evidence necessarily violated the Eighth Amendment. *Penry I*, 492 U.S. at 322 (emphasis added).[7] This fatal defect was not

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[6] Mitigating evidence is so crucial that individual jurors must be permitted to withhold a death sentence, irrespective of whether other jurors agree as to the existence or relevance of any mitigating factor. *See McKoy*, 494 U.S. at 444.

[7] The central significance of mental retardation to all facets of a defendant's moral culpability has long been recognized:

> Many of the antisocial actions of the mental retardate stem from an impulsive reaction against the painful awareness, hammered home by frustration, failure, and humiliation, of the "cruel trick that biology has played on him." Indeed, opinions in some death penalty cases have displayed a strong sense of compassion that reflects an awareness of the mental retardate's internal suffering. To the extent that such suffering can be

cured by a supplemental charge at Penry's retrial that allowed the jury to "give effect and consideration to" mitigating factors only "in assessing the defendant's personal culpability at the time [it] answer[ed] the special issue[s]," and that permitted consideration of such evidence only to the extent it allowed "a negative finding . . . [with respect] to one of the special issues." Penry's mental retardation would not necessarily have played *any* mitigating role in the jury's "yes" or "no" response to the three special issues;[8] indeed, any mitigating role it played might well have been offset, or surmounted, by jurors' perceptions that his retardation suggested future dangerousness, and therefore constituted an *aggravating* factor. *See id.* at 324 ("[M]ental retardation . . . is . . . a two-edged sword: it may diminish [Penry's]

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proved, it undercuts the expiation justification for capital punishment and should function as a mitigating circumstance.

James S. Liebman and Michael J. Shepard, *Guiding Capital Sentencing Discretion Beyond the "Boiler Plate": Mental Disorder as a Mitigating Factor*, 66 Geo. L.J. 757, 825 (1978) (internal footnotes omitted).

Indeed, while this Court has suggested that the *Penry I* principle might not necessarily apply expansively outside the context of Penry's mental retardation, *see, e.g., Graham v. Collins*, 506 U.S. 461, 475-76 (1993); *Johnson v. Texas*, 509 U.S. 350, 369 (1993), the core holding of *Penry I* nonetheless still applies in the case of Penry himself. *See, e.g., Penry v. Johnson*, 215 F.3d 504, 515 (5th Cir. 2000) (Dennis, J., dissenting).

[8] This Court has recognized a whole panoply of mitigating factors that are only marginally relevant to the special issues of the Texas statute, but that jurors nevertheless *must* be allowed to consider and take into account. These include not only mental retardation and a history of childhood abuse, but also a defendant's troubled family history and emotional disturbance, *Eddings v. Oklahoma*, 455 U.S. 104, 107, 115 (1982), his drug or alcohol dependence, *Sumner v. Shuman*, 483 U.S. 66, 81-82 (1987), his disadvantaged economic background, *Hitchcock v. Dugger*, 481 U.S. 393, 397-98 (1987); *Brown*, 479 U.S. at 545 (O'Connor, J., concurring), and even his post-offense conduct, *Skipper v. South Carolina*, 476 U.S. 1, 4-5 (1986). None of these factors would have received adequate consideration under the jury charge at issue here.

blameworthiness for his crime even as it indicates that there is a probability that he will be dangerous in the future.").

II. THERE WAS A "REASONABLE LIKELIHOOD" THAT PENRY'S JURORS MISUNDERSTOOD THEIR RESPONSIBILITIES WITH RESPECT TO PENRY'S MITIGATING EVIDENCE.

The resentencing instructions at issue were unduly confusing, and there is a "reasonable likelihood" that Penry's jurors applied inaccurate — and unconstitutional — legal rules to their sentencing determination. This reasonable likelihood mandates that Penry's sentence be vacated here, just as it was in *Penry I*.

In *Boyde v. California*, 494 U.S. 370 (1990), this Court explained that a capital sentence must be overturned whenever "there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Id.* at 380.[9] "[A] defendant *need not* establish that the jury was *more likely than not* to have been impermissibly inhibited by the instruction . . . ." *Id.* (emphases added).[10]

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[9] This Court frequently has vacated capital sentences imposed in the face of the sentencer's misunderstanding of applicable legal standards. *See, e.g., Mills v. Maryland*, 486 U.S. 367, 376 (1988) (jurors erroneously believed that they could give effect to a mitigating factor only upon reaching unanimous agreement); *Caldwell v. Mississippi*, 472 U.S. 320, 341 (1985) (in reliance on a reviewing court's power to impose a lesser appropriate penalty, jury might erroneously have believed that it was not ultimately responsible for sentencing decision); *Eddings*, 455 U.S. at 117 (trial judge misunderstood his duty to consider all mitigating evidence in mistaken reliance on state law).

[10] The mere "*risk* that the death penalty will be imposed in spite of factors that may call for a less severe penalty" is "unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." *Penry I*, 492 U.S. at 328 (emphasis added) (internal quotation marks and citations omitted).

There is every reason to believe that Penry's jurors misunderstood their prerogative to impose a sentence less than death in response to mitigating evidence that spoke to his "moral culpability" but not to the special issues. Even in ideal circumstances, a disturbingly high proportion of lay jurors misunderstand that specific prerogative.[11] The likelihood of misunderstanding is only heightened by the limitations inherent in a special issues instruction such as that used here. A juror who found a mitigating circumstance that was not responsive to any of the three special issues could choose a life sentence only after reaching the unlikely conclusion that the instruction required him or her to answer

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11 *See, e.g.*, Jordan M. Steiker, *The Limits of Legal Language: Decisionmaking in Capital Cases*, 94 Mich. L. Rev. 2590, 2596 n.28, 2614 & n.97 (1996) (reporting findings of the Capital Jury Project that a majority of California jurors who had served in capital cases did not understand the concept of mitigation). *See also* Craig Haney, *Taking Capital Jurors Seriously*, 70 Ind. L.J. 1223, 1229 (1995) (reporting that "less than one-half of [study] subjects could provide even a partially correct definition of the term 'mitigation,' almost one-third provided definitions that bordered on being uninterpretable or incoherent, and slightly more than one subject in ten was still so mystified by the concept that he or she was unable to venture a guess about its meaning") (citing Craig Haney & Mona Lynch, *Comprehending Life and Death Matters: A Preliminary Study of California's Capital Penalty Instructions*, 18 Law & Hum. Behav. 411, 420-21 (1994)); Peter Meijes Tiersma, *Dictionaries and Death: Do Capital Juries Understand Mitigation?*, 1995 Utah L. Rev. 1, 10-22 (cataloguing studies and anecdotal data concerning jurors' confusion about the meaning of mitigation). In one study, funded by the National Science Foundation, 31.9% of 684 capital jurors interviewed in seven states reported that they had believed, after hearing the jury instructions, that the death penalty was *required* if the evidence proved that the defendant would be dangerous in the future. *See* William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 Ind. L.J. 1043, 1043 n.1, 1086 & n.221, 1091 & tbl. 7 (1995); *see also* James Luginbuhl & Julie Howe, *The Capital Jury Project: Discretion in Capital Sentencing Instructions: Guided or Misguided?*, 70 Ind. L.J. 1161, 1167 (1995); Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 Cornell L. Rev. 1, 6 (1993).

one of those special issues *inaccurately*, based on factors wholly beyond the issue's purview. That is, in order to give Penry's mitigating evidence its constitutional due, a juror would have to reason as follows: "I believe that the special issue in question properly would be answered in the affirmative, but that I must nonetheless answer it in the negative, because I believe that factors beyond the issue's scope render death an inappropriate punishment."

Jurors faced with a choice between this interpretation — requiring them to disregard one or more of the special issues that they have been told must govern their decision — and an alternative requiring them to give effect to mitigating evidence only to the extent that such evidence influenced the answer to a special issue, would almost certainly choose the latter. That interpretation is consistent with the remainder of the jury instructions,[12] and, to lay jurors not versed in this

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12 If anything, the very structure of the instructions in this case undermined the jury's capacity properly to understand its prerogatives. Penry's jurors were instructed to consider the special issues, and to answer in the affirmative any issue found unanimously. The jury was provided with a form on which to indicate its findings vis-à-vis those issues; with respect to each, the form allowed the jury to find either "that the answer to this Special Issue is 'Yes'" or that "at least ten (10) jurors ha[d] a reasonable doubt as to the matter inquired about in this Special Issue, [and therefore] that the answer to this Special Issue is 'No.'" The form did *not* include an option allowing the jury to answer "No" even though it actually believed that the answer was "Yes."

As this Court noted in *Beck v. Alabama*, 447 U.S. 625, 644 (1980), jurors should not be required to violate their oaths to obey the law in order to render an appropriate verdict. *See also* Randy Hertz & Robert Weisberg, *In Mitigation of the Penalty of Death: Lockett v. Ohio and the Capital Defendant's Right to Consideration of Mitigating Circumstances*, 69 Cal. L. Rev. 317, 332-33 & n. 79 (1981) ("[S]ince the Texas statute expressly limits the jury's authority at sentencing to answering 'yes' or 'no' to the three statutory questions, a jury that did give independent weight to evidence that did not address the statutory questions would be acting 'lawlessly,' *Woodson v. North Carolina*, 428 U.S. at 303, and 'disregarding the jury's instruction,' *Roberts v. Louisiana*, 428 U.S. [325,] 335 [(1976)].").

Court's death penalty jurisprudence, would appear entirely plausible. But it also "prevents the consideration of constitutionally relevant evidence." *Boyde*, 494 U.S. at 380. Penry's sentence must therefore be vacated again. The failure of the courts below to follow the teachings of *Penry I* leaves no other choice.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

EDWARD M. CHIKOFSKY
Counsel of Record
301 East 87th Street
New York, NY 10128
(212) 289-1062

JOHN H. PICKERING
CHRISTOPHER J. HERRLING
RUSSELL P. HANSER
ANDREW R. VARCOE
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

LISA B. KEMLER
ZWERLING & KEMLER, P.C.
108 North Alfred Street
Alexandria, VA 22314
(703) 684-8000

Counsel for Amicus Curiae
National Association of Criminal Defense Lawyers

January 2001